right being entirely defeated by reason of these difficulties. It was intended, in my opinion, in such cases to enable the court to order substituted service, and that when such substituted service is directed it should have all the effects of personal service.' Those observations of Mellor J. have been over and over again approved, and I think the present case is well within them."

In the recent case of *Gurtner* v. *Circuit*[4] the defendant had emigrated to Canada and could not be traced. The plaintiff's solicitors wrote to the Motor Insurers' Bureau seeking their help to trace the defendant's insurers and the Bureau asked the Royal Insurance Company to act for them, but neither the plaintiff nor the insurance company were able to trace the name of the insurers or the whereabouts of the defendant. The plaintiff in due course applied for an order of substituted service on the defendant "at c/o The Royal Insurance Co. Ltd., 24/28 Lombard Street, London E.C.3". The Bureau then applied by summons to be added as defendants to the plaintiff's action and to have set aside the order for substituted service of the writ. They failed for the reason thus stated by Lord Denning M.R. at p. 597:—

"In my opinion, therefore, the order for substituted service made on June 22, 1967, could be set aside if it would serve any useful purpose. If there were any possibility of tracing the defendant in Canada, substituted service should be ordered by advertisement and so forth. But that seems to be a useless procedure here. The practical course is to allow the order for substituted service to stand without incurring any further costs: and to allow the service to stand."

There was, of course, a practical solution which the court unanimously held acceptable. As Diplock L.J. (as he then was) said, at p. 602:—

"Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely 'adjudicated upon' unless the rules of natural justice are observed and all those who will be liable to satisfy the judgment are given an opportunity to be heard. In the case of an ordinary insurer, this does not arise in practice, since the standard terms of a third-party liability policy give to the insurer a contractual right to conduct the defence of the running-down action in the name of the assured. But as I read his judgment in the *Fire Auto & Marine* case,[5] John Stephenson J. would have allowed an ordinary insurer to be added as a party to a running-down action if the policy of insurance did not contain such a term. And this, I think, would be right.

I do not think the rules of natural justice depend upon a technicality as to the procedure by which the liability of a person who is bound to satisfy the judgment obtained by the plaintiff in the running-down action is enforceable. So long as it is legally enforceable against that person either directly by the plaintiff or indirectly by the Minister for the plaintiff's benefit under such a contract as exists in the present case, the court has jurisdiction to add that person as a party and ought normally to exercise its discretion by granting his application to be added. I think, therefore, that the bureau is entitled to be added as a party to the present action."

We trust that the principles applied in the cases above cited will throw a guiding light to victims of road accidents who find themselves baffled by the disappearance of the defendant.

Order accordingly.

Solicitors: *Dharmananda & Co.; Cheang Lee & Ong.*

COMMISSIONER FOR RELIGIOUS AFFAIRS, TRENGGANU & ORS. v. TENGKU MARIAM BINTI TENGKU SRI WA RAJA & ANOR.

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) February 9, 1970]

[Kuala Trengganu — Federal Court Civil Appeal No. X.13 of 1969]

Muslim Law — Wakf — Validity of — Estoppel — Fetua issued by Mufti — Effect of — Trengganu Administration of Islamic Law Enactment, 1955, ss. 20 & 21.

Estoppel — Evidence Ordinance, 1950, s. 115 — Suits between the representor's representatives and the representee's representatives.

This was an appeal from the judgment of Wan Suleiman J. ([1969] 1 M.L.J. 110) in which he declared the *wakf* to be invalid as (a) it was essentially for the benefit of Tengku Chik's family and the gift to charity was illusory and (b) it contained a power of revocation. It appeared that the parties had agreed to refer the document of *wakf* to and abide by the decision of the Mufti or the *Majlis Alim Ulama*. This was done and the Mufti had given a *fetua* that the *wakf* was valid.

Held, allowing the appeal: (1) (by Azmi L.P. and Suffian F.J.) although the *wakf* was invalid, the parties were estopped from challenging its validity as they or their predecessors had agreed to abide by the decision of the Mufti in this case;

(2) (by Ali F.J.) the respondents in this case were precluded from challenging the validity of the *wakf* as an authoritative ruling binding on them had been given by the Mufti and therefore the trial court had in the circumstances no jurisdiction to hear the case.

Cases referred to:-

(1) *Abdul Fata Mohamed Ishak* v. *Russomoy Dhur Chowdhry* (1894) 22 I.A. 76.

(2) *Fatuma binti Mohamed* v. *Mohamed bin Salim* [1952] A.C. 1.

(3) *Talibu bin Mwijaka* v. *Executors of Siwa Haji Decd.* [1907] 3 E.A.L.R. 33.

(4) *Said bin Mohammad* v. *Wakf Commissioner* (1946) 13 E.A.C.A. 32.

(5) *Abdul Satar & Ors.* v. *Advocate-General of Bombay* A.I.R. 1933 Bom. 87.

(6) *Sarat Chunder Dey* v. *Gopal Chunder Laha* 19 I.A. 203; I.L.R. 20 Cal. 296.

(7) *Cairncross* v. *Lorimer* (1860) 3 Macq. 829.

(8) *Raja of Deo* v. *Abdullah* (1918) 45 I.A. 97; I.L.R. 45 Cal. 909; [1918] M.W.N. 406.

(9) *Guaranty Trust Company of New York* v. *Hannay & Co.* [1915] 2 K.B. 536.

(10) *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18.

(11) *Ramah binti Ta'at* v. *Laton binti Malim Sutan* (1927) 6 F.M.S.L.R. 128.

(12) *Patimah binti Hanis* v. *Haji Ismail bin Tamin* [1939] M.L.J. 134.

(13) *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government & Ors.* [1960] A.C. 260, 286.

FEDERAL COURT.

Edward Lim for the 1st and 4th appellants.

S. T. Chung and *Eugene Phoa* for the 2nd appellant.

H. L. Wrigglesworth and *Edward Lim* for the 3rd appellant.

Lim Kean Chye and *M. Sivalingam* for both respondents.

Cur. Adv. Vult.

Azmi L.P.: I have the opportunity of reading the judgment of my brother Suffian F.J. and I agree with him that the appeal should be allowed for the reasons given by him.

Perhaps I should say a few words in reference to the judgments of the Privy Council in the Indian case of *Abdul Fata Mohamed Ishak* v. *Russomoy Dhur Chowdhry*[1] and the Kenyan case of *Fatuma binti Mohamed* v. *Mohamed bin Salim.*[2] In the Indian case the facts were that two Muslim brothers made a *wakf* whereby they themselves were to be the first *mutawallis* of the *wakf*. The entire benefit of the *wakf* was to go to their children in the first instance and their descendants from generation to generation until the total extinction of the family. Thereafter the income of the *wakf* was to be applied to the benefit of widows, orphans, beggars and the poor.

The results of their Lordships' judgment was that a *wakf* was valid only if the effect of the deed of *wakf* was to give the property in substance to charitable uses. It was not valid if the *wakf* was founded 'for the aggrandisement of the family' or where the gifts to a charity was illusory or merely nominal. This decision created a storm in India as it was deemed to go against the fundamental notions of Islamic law. Finally the Indian legislature stepped in by passing the Mussalman Wakf Validating Act 1913, which provides that *wakfs* for the support of a man's descendants and family are proper and lawful and where the person creating the *wakf* is a Hanafi Mussalman, it is also lawful for him to provide for his maintenance and support during his lifetime or for payments of his debts out of the rents and profits of the property dedicated, provided that in both cases the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

In 1951 their Lordships of the Privy Council in the Kenyan case of *Fatuma binti Mohamed* v. *Mohamed bin Salim* followed their own decision in the Indian case of *Abdul Fata Mohamed Ishak* v. *Russomoy Dhur Chowdhry*. Lord Simonds delivering the judgment of their Lordships cited a passage in the judgment of Hamilton J. in another East African case of *Talibu bin Mwijaka* v. *Executors of Siwa Haji Decd.*[3] I will now cite only a part of the passage: -

"A study of the question shows that while the Mohamedan law, uninfluenced from outside sources, permitted perpetuities and the erection of *wakfs* for family aggrandizement solely, the influence of English judges and of the Privy Council has gradually encroached on this position until decisions given quite recently have decided that such *wakfs* are illegal, and it has now been clearly established that a *wakf* for family aggrandizement or security, the ultimate beneficiaries of which are the poor, whether mentioned by name or supplied by implication, are invalid. The Mohamedan law in East Africa has, however, not been subjected to the same modifying influence as in India, and remains the same as when the *Min Haj* was written in the sixth century of the Hejira."

Lord Simonds in reference to the above among other things says this: -

"But they cannot accept the theory which appears to underlie his (Hamilton J's) decision, that the interpretation of Mohamedan law given by this Board in a series of cases is confined to that law as applied or administered in India. On the contrary, it has not been suggested that, apart from the differences existing among the Shafi, Hanafi and other sects, which have no present significance, Mohamedan law is not the same in East Africa as in India. The appellants have themselves relied on its universality and invoke the text of the Koran and the writings of learned commentators who expounded the law not of East Africa or any part of it but of the whole Muslim world. In these circumstances their Lordships are as little justified in reviewing *Abdul Fata's* case in an appeal from the courts of Kenya as they would be in an appeal (if that were now possible) from the courts of India. In *Said bin Muhammad* v. *Wakf Commissioner*[4] already referred to, the experienced judges of the Court of Appeal for Eastern Africa did not doubt that on a question of Mohamedan law decisions of the Privy Council in appeals from India must bind them in appeals from the High Court of Zanzibar. Their Lordships are of opinion that this was clearly the correct view and that it must prevail also in appeals from Kenya."

The effect of the above would be that the Malaysian courts would also be bound by the judgment of the Privy Council in *Abdul Fata's* case. Whether that state of affairs should continue or not is a matter for the legislature.

Suffian F.J.: The question for decision in this appeal is whether a *wakf* created by Tengku Chik on 22nd February, 1941, was valid or not. The plaintiffs say that it was not, but the defendants say that it was. Wan Suleiman J. before whom the matter came agreed with the plaintiffs that it was not. The second and third defendants have appealed to us.

The subject of the *wakf* is part of a large tract of land known as the Chenderong Concession, some 65,000 acres in area, of which Tengku Chik owned an undivided 3/8 share.

On 22nd February, 1941, he executed a document purporting to create a *wakf* of his share in the Concession, of which document the authorised translation is reproduced as an appendix * to this judgment. It is the validity of this document that is in issue in these proceedings. The *wakf* was registered in the office of the Commissioner for Religious Affairs, Trengganu.

Tengku Chik died on 20th June, 1956, leaving the following next-of-kin: -

(1) his widow Che' Mek binti Haji Mohamed, the third defendant in the lower court; and

(2) his cousin Tengku Sri Wa Raja (hereinafter referred to as the cousin).

The widow, Che' Mek binti Haji Mohamed, was granted (and in due course extracted letters of administration to Tengku Chik's estate) by the High Court in Kuala Trengganu. Apparently the cousin disputed the validity of the *wakf*, and on 24th January, 1957, the widow and he entered into a written agreement (hereinafter referred to as the 1957 agreement), the effect of which may be summarised as follows: for a consideration of $20,000 payable by Che' Mek binti Haji Mohamed to the cousin (the method of payment was detailed in the agreement) he withdrew his objection to Che' Mek binti Haji Mohamed being granted letters of administration, that immediately after letters of adminis-

* See page 229, *infra*.

tration had been extracted she was to refer the document of *wakf* to the court and/or to the Mufti or to the *Majlis Alim Ulama* for a decision and that the two parties would abide by such decision. It was further agreed that if the *wakf* was declared void, Tengku Chik's undivided 3/8th share in the concession was to be distributed as follows:

(a) 1/6th of the 3/8th to Che' Mek binti Haji Mohamed, the administratrix;

(b) 2/6th of the 3/8th to three named persons; and

(c) the remaining 3/6th of the 3/8th to the cousin;

but that, if it was declared valid, the cousin was to get nothing, except the $20,000 payable under the agreement. Finally, the cousin confirmed that save as aforesaid he had no further claim against Tengku Chik's estate.

Under this agreement Che' Mek binti Haji Mohamed was to refer the *wakf* to the court or to the Mufti or to the *Majlis Alim Ulama*. Probably this was because under the Trengganu Administration of Islamic Law Enactment No. 4 of 1955 a *wakf* can come up before the religious authorities in three ways: under section 25 (1) (b) (viii) which provides that —

"The Court of the Chief Kadzi shall ... in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties profess the Religion of Islam and which relate to .... *wakf* or *nazar*, ...";

under sections 20 and 21 which provide —

"20. (1) Any person, Court, Civil Court, Department, or Institution, may, by letter addressed to the Commissioner request the issue of a *fetua* or ruling on any point of Islamic law, or doctrine, or Malay customary law.

(2) On the receipt of any such request the Commissioner shall if the question be one of Islamic law or doctrine send the request to the Mufti; and if the question be one of Malay customary law present the request to the Majlis.

(3) The Mufti and the Majlis respectively shall consider every such request submitted to them and shall, unless the point referred be considered to be frivolous or for other good reason ought not to be answered, prepare a ruling thereon. The Mufti may in preparing his ruling consult the Committee but shall not be obliged to accept their advice.

(4) The ruling when prepared shall be forwarded by the Commissioner to the person presenting the request.

(5) If at any time the Majlis is of the opinion that it is in the interest of the Muslim Community as a whole that a ruling given by the Mufti should be reconsidered they may by resolution supported by not less than three quarters of the members request His Highness the Sultan to consider the ruling. His Highness the Sultan may invite the Majlis to express an opinion thereon or take such other action as may be deemed fit. His Highness may thereupon determine the point referred.

(6) The Commissioner may at any time publish a ruling submitted to him by the Mufti or the Majlis made respectively upon a point of Islamic law or doctrine, or Malay customary law.

21. (1) In making and issuing any ruling upon any point of Islamic law or a doctrine in the manner hereinbefore provided the Mufti shall ordinarily follow the orthodox tenets of the Shafeite sect:

Provided that if the Mufti considers it to be in the interests and welfare of the Muslim community he may issue the *fetua* within the tenets of any of the four sects.

(2) In making and issuing any ruling upon a point of Malay customary law in manner hereinbefore provided the Majlis shall have due regard to the *Adat Istiadat Melayu* or Malay customary law applicable in the State and in the event of the point in any manner concerning Islamic law shall refer the matter to the Mufti for his advice.

(3) Any ruling shall, if the Majlis so determines or if His Highness the Sultan so directs, be published by notification in the *Gazette* and shall thereupon be binding on all Muslims resident in the State; Provided that a *fetua* on Malay Custom shall be binding only on Muslims of the Malay race resident in the State.";

and finally under section 65 which provides —

"If in the opinion of the Majlis or the Commissioner the meaning or effect of any instrument or declaration creating or affecting any *wakf* or *nazar* is obscure or uncertain, the matter may be referred to the Committee for its opinion as to the meaning or effect thereof, and the Commissioner shall on the approval in writing of His Highness the Sultan act on any opinion so given by the Committee or a majority thereof."

We do not know precisely which course was followed by Che' Mek, but we do know that the Mufti in due course issued a *fetua* (probably on 13th December, 1960); so it may safely be surmised that Che' Mek acted under sections 20 and 21. The Mufti ruled that the *wakf* was valid and his ruling was, on the direction of His Highness the Regent, published by notification in the *Gazette* on 15th December, 1966. The notification was as follows:

"No. 271

ADMINISTRATION OF ISLAMIC LAW ENACTMENT, 1955(1375) (TRENGGANU ENACTMENT NO. 4 OF 1955)

Rulings under Section 21 (3)

In exercise of the powers conferred by subsection (3) of section 21 of the Administration of Islamic Law Enactment, 1955(1375) His Highness the Regent hereby directs that the following rulings of Hahibul Fadzillah Mufti Syed Yusof bin Ali Al-Zawawi J.P., P.J.K. be published in the Government *Gazette*.

The *wakf* of Tengku Chik bin Abdul Rahim dated 25th Muharram, 1360 corresponding to 22nd February 1941 which was registered in the Office of the Commissioner for Religious Affairs Trengganu vide No. 220 in the Registration Book at pages 68-69, is in compliance with acceptable terms and is valid under the *mazhab* of Iman Abu Hanifah, Rahmatullah, which permits a person to create a *wakf* in favour of himself on such terms so as to encourage and inspire Muslims to create *wakfs*.

All *Ulamas* have agreed that all Muslims may choose to follow any of the four *mazhabs* which they prefer as in the case of performing religious obligations or services and this may be partially or completely because all the four Imams are of authority.

As the deceased himself confirmed the *wakf*, his beneficiaries have no right to meddle with the property for which he created it, for their entitlement is only to the properties belonging to him at the time of his death. In respect of the property which was made a *wakf*, he has no possession thereof at the time of his death and as such the deed cannot be accepted as or deemed to be a will.

If several beneficiaries are prevented from obtaining any shares from the property of the deceased which has been made a *wakf* this cannot be made ground upon which the *wakf* is to be revoked, for one has absolute rights over his property as long as he lives and is not under any possibility of being deprived of his freedom under Islamic Law.

All your questions which were annexed to the copy of the *wakf* and submitted are answered in the above explanation. (SUK.Tr (Gen.) 1122; (152) dlm. P.U. 15/75)"

The cousin had in the meanwhile died, on 26th December, 1959, leaving the following next-of-kin:

(i) Tengku Maimun, a widow;

(ii) a second widow, another Che' Mek, this time Che' Mek binti Haji Talib;

(iii) Tengku Ngah, his son; and

(iv) Tengku Mariam and Tengku Aishah, both daughters by the first widow and both minors and the plaintiffs herein.

Letters of administration to the cousin's estate were granted to but not extracted by his son Tengku Ngah and they were granted to the Official Administrator on 21st April, 1965, and extracted by him on 16th March, 1966.

By an instrument dated 21st September, 1960 (hereinafter referred to as the 1960 agreement) and for valuable consideration emanating from Cindee Developments Ltd., the second defendant, Tengku Ngah as the purported administrator of the cousin's estate (i.e., his father's estate) confirmed the 1957 agreement.

By a letter of consent dated 15th December, 1960, Tengku Ngah, as the purported administrator and beneficiary of the cousin's estate, accepted the validity of the *wakf* unconditionally.

By a letter of consent dated the same day, Tengku Maimun the first widow and mother of the infant daughters and for and on their behalf also accepted unconditionally the validity of the *wakf*.

So the position by 15th December, 1960, was this: the *wakf* created by Tengku Chik in 1941 had been confirmed by the 1957 agreement between both his beneficiaries, namely, his widow the first Che' Mek the third defendant and his cousin Tengku Sri Wa Raja, and after the cousin's death it was further confirmed, on 21st September, 1960, for valuable consideration emanating from the second defendant, by the cousin's son Tengku Ngah as the purported administrator of his father's estate, and again by him by the letter of consent of 15th December, 1960, also as the purported administrator and beneficiary of his father's estate, and it was finally confirmed by the letter of consent of 15th December, 1960, signed by the cousin's first widow, the mother of the two infant daughters, and for and on their behalf. On 13th December, 1960 the Mufti had ruled that the *wakf* was valid, though this *fetua* was not gazetted until 15th December, 1966.

Relying on the title of the Commissioner for Religious Affairs, Trengganu, as indicated by *inter alia* —

(i) the *wakf*,

(ii) the 1957 agreement,

(iii) the 1960 agreement,

(iv) the Mufti's *fetua*,

(v) the two letters of consent of 15th December, 1960, and

(vi) the representations of the cousin's son Tengku Ngah and of the beneficiaries (other than the infant plaintiffs) of the cousin's estate,

Cindee Developments Ltd., the second defendant, on or about 7th January, 1961, entered into an agreement (hereinafter referred to as the 1961 lease) for the lease of the said 3/8th share in the concession with the Commissioner for Religious Affairs, Trengganu.

In Administration Petition No. 2 of 1960 and on the application and supporting affidavit of Tengku Ngah as administrator, the High Court in Kuala Trengganu on 9th February, 1961, ordered to be deleted from the assets of the cousin's estate the 3/8th share in the concession.

The infant plaintiffs (the widow's two daughters) are Muslims and residents of Trengganu. They sue the Commissioner for Religious Affairs, Trengganu, the first defendant; Cindee Developments Ltd., the second defendant; Che' Mek binti Haji Mohamed (Tengku Chik's widow), the third defendant; and the Majlis Ugama Islam dan Istiadat Melayu, Trengganu, the fourth defendant. They ask the court to declare the *wakf* void and to order that the 1961 lease be set aside. They claim that the *wakf* is void on five grounds:

(a) there is no clear and true dedication in perpetuity of the donor's property for Islamic, religious and/or charitable purposes — it is said that the appropriate Muslim law is the law relating to followers of the Hanafi and Shafei schools;

(b) the dispositions contained in the *wakf* are subject to such uncertain contingencies as to invalidate the whole *wakf;* the uncertain contingencies refer to the dedications which were made dependent on the extinction of several families or branches thereof and their relatives in order of nearness or affinity;

(c) the reservation of the *wakf* by the donor of a power of revocation is contrary to Muslim law of the Hanafi school;

(d) the provisions in the *wakf* as to the discharge of the donor's outstanding debts are also contrary to Hanafi law;

(e) numerous uncertainties in the *wakf* are contrary to Muslim law, which recognises the validity of only those *wakfs* that are capable of being justly administered. The numerous uncertainties are particularised as follows:

(1) the uncertainty of the dedications for religious and charitable purposes;

(2) the uncertainty of the conditions and the funds out of which several payments mentioned therein are to be paid.

All the defendants resist the suit, but when the matter came up for trial before Wan Suleiman J. on 21st January, 1968, counsel for the plaintiffs withdrew the suit against the first defendant as the Administration of Islamic Law (Amendment) Enactment, 1963, had substituted the fourth defendant for the first. So here it would be sufficient if only the defences of the other three defendants are given.

They do not admit that the plaintiffs are beneficiaries of Tengku Chik's estate under Shafei law or at all.

They say that the act of the third defendant on or about 6th January, 1961, registering with the first

defendant under the Administration of Muslim Law Enactment, 1955, the *wakf*, and the 1961 lease between the first and second defendants was lawful and effective because the *wakf* created by Tengku Chik was valid.

They say that the *wakf* is valid and binding on the plaintiffs and on each of them because each of them is and was at all material times a Muslim resident in Trengganu and the validity of the *wakf* has been affirmed by the Mufti's *fetua* duly gazetted under section 21 (3) of the Enactment on 15th December, 1966.

They say further and in the alternative that, if the *wakf* is contrary to Islamic law, it is nevertheless valid and binding on the plaintiffs and on each of them because of the *Gazette* notification.

They also say that the plaintiffs have no further right to the *wakf* property because of the 1957 agreement, the 1960 agreement and the two letters of consent of 15th December, 1960, and the second defendant also says that the plaintiffs are estopped from challenging the validity of the *wakf*. I shall give details of these defences when dealing with estoppel in a moment.

On 29th December, 1968, Wan Suleiman J. delivered reserved judgment declaring the *wakf* void and setting aside the lease of 7th January, 1961, between the first and second defendants.

In a long and careful judgment, which has been reported in [1969] 1 M.L.J. 110, the learned judge held as follows. First, he said that it did not matter whether the plaintiffs were the beneficiaries of Tengku Chik (which was denied by the defendants) or of the cousin (which was admitted by the defendants), that what mattered was that, if the *wakf* was void, it would remain part of Tengku Chik's estate, and through him, would become part of the cousin's estate, and that it could not be disputed that the plaintiffs had a real interest in the subject matter.

Secondly, he held that the gazetting of the Mufti's *fetua* did not affect the power of the court to propound Islamic law.

Thirdly, he held that the *wakf* was void on two grounds: first, because it was a perpetual family settlement, that the ultimate gift to charity was illusory and too remote (he followed two Privy Council decisions, the first being *Abdul Fata Mohamed Ishak* v. *Russomoy Dhur Chowdhry*[1] and the second *Fatuma binti Mohamed bin Salim Bakhshuwen and Another* v. *Mohamed bin Salim Bakhshuwen*[2]); and secondly, because it contained a power of revocation. For this, he relied on *Abdul Satar and Others* v. *Advocate-General of Bombay*[5].

Thus it will be seen that the learned judge held that the *wakf* was void on two out of the five grounds urged by the plaintiffs, namely, grounds (a) and (c), but he decided against the plaintiffs as regards grounds (b), (d) and (e).

The three defendants appeal to this court, but by a mistake in the preparation of the appeal record the first defendant has been cited as the first appellant. When the appeal first came up before us on 24th August, 1969, it was announced that the fourth defendant did not wish to pursue their appeal and their appeal has therefore been struck off.

So ultimately this matter resolves itself into a contest between Cindee Developments Ltd. and Che' Mek binti Haji Mohamed (Tengku Chik's widow) on the one hand, who all contend that the *wakf* created by Tengku Chik is valid, and on the other hand Tengku Mariam and Tengku Aishah, the infant plaintiffs daughters of the cousin, who contend that the *wakf* is void.

To avoid confusion, I shall continue to refer to Cindee Developments Ltd. as the second defendant and to Che' Mek binti Haji Mohamed as the third defendant.

The grounds of appeal are as follows.

The second and third defendants first say that the learned judge misdirected himself in holding that the plaintiffs had discharged the onus, which was upon them, of establishing that they were interested in the subject matter of the action, and that the learned judge ought to have held, in the absence of any evidence to the contrary adduced by the plaintiffs, that by reason of the 1957 deed and of the *fetua* the cousin's estate did not include Tengku Chik's three-eighths share in the concession and that accordingly the plaintiffs had no cause of action.

Secondly, the second and third defendants say that the learned judge was wrong in holding that the court retained an unfettered discretion as to how much of a duly gazetted *fetua* the court should accept, that he was wrong in holding that there was nothing in the Administration of Islamic Law Enactment, 1955, which had affected the power of the court to propound Islamic law and that he ought to have held that the *fetua* was binding upon the plaintiffs by virtue of section 21 (3) of the Enactment and that accordingly they had no cause of action.

Thirdly, the second and third defendants say that the learned judge was wrong in holding that the *wakf* contained no clear and true dedication in perpetuity of the donor's property for Islamic, religious and/or charitable purposes and that in the said *wakf* the donor reserved unto himself a power of revocation.

The second defendant has an additional ground of appeal as follows: it says that the learned judge should have held that the plaintiffs and each of them were estopped from denying the validity of the *wakf*.

I find it convenient to deal with the points raised in this appeal, in the following manner. First, I shall deal with the effect of the *fetua*. Second, if the *fetua* does not preclude the court from determining the validity of the *wakf*, I shall deal with the question whether the *wakf* is valid or not. Thirdly, if the *wakf* is void, are the plaintiffs estopped from denying its validity? Fourthly, have the plaintiffs discharged the onus, which was upon them, of establishing that they were interested in the subject matter of the action?

Effect of Fetua

Before Trengganu joined the Malayan Union on 1st April, 1946, there is no doubt that its legislature could make laws regarding the establishment, jurisdiction and powers of all courts, be they civil or religious. By the time of the enactment by the Trengganu Council of State on 5th November, 1955, of the Administration of Islamic Law Enactment, 1955, which was assented to and came into effect on 22nd March, 1956, the Malayan Union had given way to the Federation of Malaya established by the Federation of Malaya Agreement, 1948, which came into effect on 1st February, 1948. That Agreement, which was the Constitution, and regulated the powers of the respective members, of the new federation, provided by clause 48 and item 17 of the Second Schedule that only the federal legislature had power to make laws with respect to the establishment, jurisdiction and powers of all courts, excluding Muslim religious courts. I have examined clauses 5, 100 and 101 of the Agreement and find nothing in them to make me doubt that the scheme of the Agreement is clearly to divide courts into two distinct categories, civil and religious, and that only the federal legislature had power to legislate regarding civil courts, leaving Muslim religious courts to Councils of State.

Now at the time of the passage of the Trengganu Enactment the Courts Ordinance, 1948, was in force. That Ordinance established a pan-Malayan High Court with unlimited criminal and civil jurisdiction. Section 47 and item 1 of its Second Schedule clearly established that then the High Court had jurisdiction to determine the validity of a *wakf*.

It was possible, of course, to take away this jurisdiction from the High Court, but that could have been done only by the federal legislature, and that has never been done.

As has been seen above, a *wakf* may come up for adjudication before the Trengganu religious authorities in three ways and it would appear that Che' Mek binti Haji Mohamed referred the *wakf* in question for a ruling under section 20 to the Commissioner of Religious Affairs, who then sent the reference to the Mufti and the Mufti ruled that it was valid. Section 21 (3), as has been seen, provides that —

"Any ruling shall, if.... His Highness the Sultan so directs, be published by notification in the *Gazette* and shall thereupon be binding on all Muslims resident in the State;....

The question arises whether such a notification is binding on the High Court. In the course of argument before us Mr. Chung for the second defendant admits that the High Court is not a Muslim resident in the State within the meaning of this sub-section and therefore it is not in that sense bound by the *fetua*, but argues that, as the plaintiffs are Muslims resident in the State (this is not disputed), they are prohibited by this provision from coming to the High Court to contest the validity of the *wakf* and as they have ignored this prohibition, the court should reject their suit. I regret I do not agree with this contention. In my judgment, Wan Suleiman J. was right in ruling that he was not precluded by the gazetted *fetua* from himself determining the validity of the *wakf*. The High Court had power before the passage of the Trengganu Enactment to do so and this power could not be and has not been taken from it by State law. The 1957 Constitution which replaced the Federation of Malaya Agreement, 1948, which Constitution with amendments is still in force today, has in no way altered the position.

Validity of the Wakf

I now turn to the second question, namely, whether or not the *wakf* was valid. I have examined the *wakf* instrument and the authorities mentioned in the learned judge's judgment and those cited before us, and I am satisfied that the *wakf* here was essentially for the benefit of Tengku Chik's family and that the gifts to charity were illusory and that on the authority of the Privy Council decisions cited to us the learned judge was bound and we are bound to hold that the *wakf* was therefore void, notwithstanding the Mufti's ruling to the contrary. This embarrassing situation can only be set right by legislation, as has been done in India and other places.

Estoppel

I now turn to estoppel.

The defence of estoppel is raised only by the second defendant. The learned judge did not deal with it in his judgment. The second defendant urges the same defence in this appeal. As I understand it, the argument is as follows.

The second defendant relies on representations made by the cousin in the 1957 agreement between him and Tengku Chik's widow, the third defendant. It will be recalled that the agreement recited that the cousin disputed the validity of the *wakf* and that then it recorded an "amicable settlement" between the parties, that by clause 7 the widow agreed that after she had extracted letters of administration to her husband's estate she would refer the *wakf* document to the court and/or to the Mufti or to the *Majlis Alim Ulama* for a decision on its validity and that she and the cousin would abide by such decision, and that by clause 9 she and the cousin agreed that, should the *wakf* be declared valid, the cousin was to forgo his claim to the *wakf* property, except the balance of the money payable under the agreement. It is submitted that this representation by the cousin was in the nature of a representation *in rem* and intended by both parties to affect the *wakf* property as such.

Alternatively it is said that the cousin's beneficial interest in Tengku Chik's estate was extinguished by the 1960 agreement executed on 21st September by his son, Tengku Ngah, as the administrator of his father the cousin's estate confirming the 1957 agreement for a consideration emanating from the second defendant.

In the further alternative, it is said that the cousin's beneficial interest in Tengku Chik's estate was extinguished by the letter of consent dated 15th December, 1960, whereby Tengku Ngah as the administrator and beneficiary of his father the cousin's estate, unconditionally accepted the validity of the *wakf*.

Finally it is said that the cousin's beneficial interest in Tengku Chik's estate was extinguished, as re-

gards any part thereof to which the plaintiffs, his daughters, might otherwise have succeeded, by the letter of consent dated 15th December, 1960, whereby their mother, Tengku Maimun binti Mohamed Yusoff, accepted unconditionally the validity of the *wakf*.

Because it was ruled by the Mufti that the *wakf* was valid, the *wakf* property fell by operation of law into the control of the first defendant, the Commissioner for Religious Affairs, and relying on the Commissioner's title as indicated by —

(1) the *wakf;*

(2) the 1957 agreement;

(3) the 1960 agreement;

(4) the Mufti's *fetua* given on 13th December, 1960;

(5) the two letters of consent of the 15th December, 1960; and

(6) the representations of Tengku Ngah and the beneficiaries (other than the infant plaintiffs) of the cousin's estate,

the second defendant entered into the agreement for the lease of Tengku Chik's share in the concession with the Commissioner for Religious Affairs, the first defendant, on 17th January, 1961.

It is said that but for the cousin's representations that he would abide by the Mufti's ruling, and that in the event of the Mufti ruling that the *wakf* document was valid he would forgo his share in Tengku Chik's estate, the second defendant would not have entered into the 1961 lease with the Commissioner for Religious Affairs, and having entered into that lease it had spent some 3/4 million dollars on developing the land and that therefore on the faith of the cousin's representations the second defendant had altered its position to its detriment. It is said that the plaintiffs, being bound by the representations made in the 1957 agreement by their deceased father, are estopped from making any averment at variance with his former representations, namely, that in the event of the *wakf* being declared valid he would forgo his claim: in other words that they are estopped from challenging the validity of the *wakf*.

The law of estoppel is found in section 115 of the Evidence Ordinance No. 11 of 1950 which provides —

"When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and such person or his representative in interest to deny the truth of that thing."

What declaration was made by the cousin and what thing did he intentionally cause or permit the second defendant to believe to be true? As has been said, the submission is that the cousin has in the 1957 agreement declared his willingness to forgo all claims to the *wakf* property should the *wakf* document be declared valid by the Mufti and following the ruling by the Mufti that it was valid he has by that declaration intentionally caused or permitted the second defendant to believe the *wakf* to be valid.

If the cousin had lived and attempted to regain the property, would he not have been estopped from challenging the validity of the *wakf*? I think so. The *wakf* document was open to legal objections, in fact he disputed its validity, but in the 1957 agreement with the third defendant he waived his objections on condition that he was paid some money and on the further condition (that has been fulfilled) that the *wakf* document was declared valid by the religious authorities. In this state of facts the terms of section 115 of the Evidence Ordinance would have directly applied to the case, for the cousin, having by his acts and the declaration which his acts involved, intentionally caused the second defendant to believe that the first defendant was entitled to grant the lease, and therefore the cousin would not have been allowed to deny the truth of what was thereby represented, believed and acted on.

The cousin here is in the same position as Ahmad in *Sarat Chunder Dey* v. *Gopal Chunder Laha*.[6] There was some doubt regarding the validity of a *hiba* (gift) of property made to Arju Bibi by her husband. Ahmad, their son, could have challenged the validity of the gift, but instead he helped his mother mortgage the property by signing the mortgage and taking payment of the money, thereby intentionally causing the lender to believe that Arju Bibi, as proprietor under the *hiba*, was entitled to grant the mortgage. The Privy Council held that neither he nor his representative could be allowed to deny the validity of the *hiba* and that therefore persons who had bought the property at an auction sale which took place under a decree in a mortgage suit obtained by the lender against Arju Bibi obtained good title. Lord Shand, giving the advice of the Privy Council, said at page 216:

"....The general principle is thus stated by the Lord Chancellor (Campbell), with the full concurrence of Lord Kingsdown, in the case of *Cairncross* v. *Lorimer*.[7] 'The doctrine will apply, which is to be found, I believe, in the laws of all civilised nations, that if a man, either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct... I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous licence.' These words were used with reference mainly to acts indicating only subsequent consent to an appointment which had been made, and which might have been objected to when originally made; but they apply a fortiori in a case like the present, where the person estopped was a party to the transaction itself, which he, or others taking title from him, seek to challenge after a considerable interval of time."

If the cousin would have been estopped in his lifetime from challenging the validity of the *wakf*, would his daughters (the present plaintiffs) be similarly estopped? Section 115 of the Evidence Ordinance uses the words —

"in any suit or proceeding between himself and such person or his representative in interest"

Do these words imply that estoppel applies only in suits —

(a) between the representor and the representee;

(b) between the representor and the representee's representative;

but not

(c) between, as here, the representor's representatives (as plaintiffs) and the representee's representative (as second defendant)?

I do not think so. I so hold on the authority of another Privy Council decision, *Raja of Deo* v. *Abdullah.*[8] There Raja Bhikham got into difficulties and his estate was put in charge of a manager with power to sell part of the estate. He sold by public auction the village of Badam. The village was bought by K.S. for Rs 2,000 — in fact as agent for the Raja and with the Raja's money. No conveyance was executed by the manager in favour of K.S. The management came to an end and the Raja was restored to his estate. K.S. died. The Raja wanted to benefit his natural daughter, Rajeshwar. He caused K.S.'s adopted son to convey Badam to Rajeshwar, the deed of conveyance mentioning a consideration of Rs 5,000, but in reality no money passed. On 22nd April, 1898, Rajeshwar, then a minor, applied through her mother as guardian for registration and mutation of names in respect of the village. On the same day the Raja presented a petition in which he gave a brief history of the property and said that he had no objection to Rajeshwar's petition being granted. Rajeshwar's name was accordingly entered in the Government register as proprietrix of the village. The Raja died in October 1898.

To cut a long story short, the plaintiff Abdullah bought the village from Rajeshwar and in 1908 Rajeshwar conveyed it to him. The plaintiff sued the Raja's son, the Raja of Deo, for a declaration of his title to the village. Among others the defence was a denial of Rajeshwar's title to convey anything to the plaintiff. The Privy Council held that the defendant was estopped from denying Rajeshwar's title. Lord Dunedin said at page 102:

"If then Raja Bhikham had lived and attempted to regain the property these actings of his in assisting Rajeshwar obtain title to the village would, in their Lordships' view, have estopped him from making the claim. He did not do so. The present defendant is his son and succeeded by gratuitous title, and he therefore cannot do what his father would have been unable to do"

It will be noted that in the above case the representor was the old Raja Bhikham and the representee was Rajeshwar and that Abdullah the purchaser was the representee's representative, and that the suit was not one between the representor and the representee, nor was it between the representor and the representee's representative, but one between the representee's representative as plaintiff and the representor's representative as defendant, and yet the Privy Council held that the former may raise estoppel as a defence.

In view of this, in my judgment the plaintiffs in the instant case cannot be allowed to challenge the validity of the *wakf*.

In view of my conclusion that the plaintiffs are estopped from challenging the validity of this *wakf*, there is no need for me to consider the question whether or not they have discharged the onus of establishing that they were interested in the *wakf* property.

I would therefore allow this appeal with costs.

APPENDIX

(AB"6"/AB"7")

Certified English Translation

(Salutation in Arabic — not translated)

Moreover after that I, Tengku Chik bin Al-Marhum Tengku Abdul Rahim, declare and acknowledge and bear witness that I have given as *"wakf"* and free gift in perpetuity the land at Kampong Padang, Kuala Trengganu held under Grant No. 921 dated 13.10.1356 and also the house in which I am now staying and stands on the said land at Kampong Lama held under Grant C.T. No. 697 lot 511 dated 23.5.1354, Mukim Bandar, and the concession land at Chenderong, Kemaman, held under Chop dated 2.1.1324 i.e. to the extent of my share therein firstly in favour of my own self, in respect of which I rely on the authority of the Hanafi school of thought where one may give as *"wakf"* in favour of his own self and I am to enjoy the benefits derived from all that I have given as *"wakf"* in whatever manner as long as I am living.

And after my death the land at Kampong Padang, Kuala Trengganu, held under Grant No. 921 dated 13.10.1356 and house thereon will become *"wakf"* in favour of both Che Mek binti Haji Mohamed, my wife, and Ungku Habib, my adopted son, in equal share, and if the said Che Mek dies before Ungku Habib, the share of the said Che Mek shall be transferred to Ungku Habib and upon the death of Ungku Habib the *"wakf"* in his favour shall be transferred (and) become *"wakf"* in favour of his children and then his grandchildren and then their descendants and if he has no issues, the *"wakf"* shall be transferred to his nearest *"asabah"* (relative who is entitled to receive (inherit) the balance/whole estate) and then his next nearest relative and so on and if he has no *"asabah"* the *"wakf"* shall be transferred to the nearest *"zawil arham"* (relative who is not entitled to share the estate of a deceased person) and then to the next nearest and so on. And if there are no such persons it shall be transferred to the students of Islamic Law in Trengganu and as regards the portion which becomes the *"wakf"* in favour of the said Che Mek aforesaid and if she dies after Ungku Habib, the *"wakf"* shall be transferred to the nearest *"asabah"*, and then the next nearest and so on. And if she has no *"asabah"* the *"wakf"* shall be transferred to her nearest *"zawil arham"* and then the next nearest and so on, and if there are no persons the *"wakf"* shall be transferred to Islamic religious institution and students of Islamic Law in Trengganu.

And as regards the said lands and houses, Ungku Habib and Che Mek and persons who come next to them can enjoy the benefits therefrom by any means whatsoever.

And as regards the land at Kampong Lama held under C.T. No. 697 lot 511 dated 23.5.1354, Mukim Bandar, and Chenderong Concession, Kemaman, after my death 1½ (one and a half percent) of their incomes shall become *"wakf"* in favour of Omar bin Othman, who is also my adopted son, and the remainder shall be divided into four shares. One of them becomes *"wakf"* in favour of Che Mek binti Haji Mohamed, my wife, and one shall be transferred to Ungku Habib bin Syed Al-sagoff, my adopted son, and two of the shares to be transferred to the princes and princesses of the late Sultan Zainal 'Abidin namely (1) Tengku Chik Muda (ex-Sultan), (2) Sultan Sulaiman Badrol 'Alam Shah, (3) Tengku Paduka Raja, (4) Tengku Ahmad, (5) Tengku Besar, (6) Tengku Ngah Hajjah, (7) Tengku Nik Hajja, (8) Tengku Dalam, (9) Tengku Wook and also the princes of the late Yang di-Pertuan Muda Tengku Abas namely (1) Tengku Hitam (2) Tengku Ngah (3) Tengku Minah and including her grandchild Tengku Hubong and after the death of the abovenamed it (they) will be transferred to their respective sons and daughters and their descendants and if there are no sons and daughters the *"wakf"* will be transferred to their respective nearest *"asabah"* and then the next nearest and so on. And if there are no

"asabah" it will be transferred to the nearest *"zawil arham"* and then to the next nearest and so on. And if there are no such persons the *"wakf"* will be transferred to the Islamic religious institution and its students in Trengganu.

The conditions required by the person creating the *"wakf"* and which must be carried out and followed are:

(1) During the lifetime of the person creating the *"wakf"* he shall be supervisor *(Nazir)* of the *"wakf"* and he has power to withdraw alter and amend and do any act in respect of the *"wakf"*. And after his death, a most capable person among the persons who are to receive the *"wakf"* will become its supervisor. And if they are of equal ability one supervisor must be chosen by vote.

(2) Upon the death of the person creating the *"wakf"*, first of all his funeral expenses must be paid out and then his debt and pilgrimage fees for performing three "Hajis" must be paid out.

(3) A decent grave must be made and also to repair the *"wakf"* damages and repair the grave of the person making the *"wakf"*, his parents and the graves of his brothers/sisters and nephews/nieces from the income of the *"wakf"* before deducting their respective shares.

(4) To deduct not less than $30/- (thirty dollars) monthly for charity to "Koran" and *"Selawat"* reader(s) at the graves referred to in (3) above excluding the expenses connected with (3) above.

(5) Feast for the dead *(khunduri)* and *"tahlil"* must be performed at least once a week for which not less than $15.00 (fifteen dollars) must be spent.

(6) If a large area of the concession land has been opened and its income is great, 6% of its income must be deducted in order to carry out the said conditions without taking the income from other sources, and if after carrying them out there is any balance it must be used for charitable purposes, such as erecting mosque, religious schools its wells and to give as charity to unpaid mosque officials.

Except as stated and at any event the said conditions may not be wronged. (An Arabic sentence).

In witness whereof I set my hand hereunder in the presence of witness.

Signature of witness:
Sd. illegible
Haji Mat bin Wan Muda
Sd: illegible
Petition writer:

Signature of the person creating the *"wakf"*
Sd: Tengku Chik bin Abdul Rahim

This document is executed at Kuala Trengganu on 25th day of Muharram 1360 A.H. corresponding to 22nd February 1941.

Ali F.J.: This is an appeal from the judgment of the High Court, Kuala Trengganu declaring as null and void an instrument purporting to be a *wakf* on the ground that it was contrary to Muslim law. Generally stated, a *wakf* is a Muslim trust settlement of properties for charitable purposes. Sometime in 1941 Tengku Chik bin Abdul Rahim disposed of all his properties including a 3/8th share in land described as Chenderong Concession under an instrument purporting to be a *wakf* subject to certain intermediate gifts to himself as tenant for life, to his widow and an adopted son in equal shares for their lives, to the adopted son's decendents or his next of kin in the order of close proximity. Upon failure of the intermediate gifts, and after making certain prescribed payments the properties are to go to specified charities. In the instrument it is expressly stated that the *wakf* was made in accordance with Hanafi principles of Muslim law. These dispositions would deprive the lawful beneficiaries of the estate of Tengku Chik who died intestate sometime in 1956. The only beneficiaries were his widow (the third appellant) and a male cousin, Ungku Abdullah bin Abbas, otherwise known as Tengku Sri Wa Raja. The cousin disputed the validity of the *wakf* and this had led to an agreement between him and the widow whereby it was agreed that the *wakf* be referred to the High Court or the Mufti of Trengganu or a Board of Religious Advisers, known as the *Majlis Ugama Islam*, to decide on its validity. This written agreement signed on 24th January, 1957 is referred to in these proceedings as the deed of settlement of 1957. Under this deed the cousin agreed to abide by any decision made on the validity of the *wakf* on terms that if it be declared valid, he would be paid $20,000; but if it be declared void, he would be entitled to receive, among other things, 3/6th share of the 3/8th share in the Chenderong Concession. These entitlements, I believe, represent his lawful shares from Tengku Chik's estate. Sometime in February, 1957, the cousin, through his pleader, the late Enche Maidin bin Ibrahim, caused a copy of the said *wakf* to be sent to the Mufti of Trengganu with a request for a *fetua* or a ruling on its validity. By this time there was already in force in the State of Trengganu the Administration of the Islamic Law Enactment 1955 (hereinafter referred to as the Enactment). It is an Enactment to consolidate the laws relating to the administration of all matters relating to the religion of Islam and the religious courts. The request for a *fetua* was expressed to have been made pursuant to section 20(1) of the Enactment which reads:

"20.(1) Any person, Court, Civil Court, Department, or Institution, may, by letter addressed to the Commissioner request the issue of a *fetua* or ruling on any point of Islamic law, or doctrine, or Malay customary law."

In response to the request the Mufti of Trengganu gave his *fetua* in which it is stated that *wakf* is valid under Muslim law. What happened shortly after the date of the *fetua* is not clear from the evidence. Tengku Sri Wa Raja, the cousin, died intestate leaving as lawful beneficiaries, two widows, a son named Tengku Ngah and two infant daughters. The two daughters are the plaintiffs/respondents.

Sometime in September, 1960, Tengku Ngah as administrator of his father's estate entered into a written agreement with one Mr. H. G. Wong of Cindee Developments Limited (the second appellant) whereby he "confirmed" the deed of settlement 1957. For this he was paid a total sum of $1,300 as payment towards the balance due to his father under the deed of settlement. It is to be observed that Cindee Developments Ltd. was not a party to the deed of settlement. However, later in December 1960, Tengku Ngah and Tengku Maimun, one of the two widows, signed identical letters of consent unconditionally accepting the *wakf*.

On the 5th January, 1961, Tengku Chik's widow (the third appellant) registered the *wakf* with the Commissioner for Religious Affairs (the first defendant in the action). Presumably this was done pursuant to the provisions of section 60(2) of the Enactment. Two days later, on the 7th January, 1961, the Commissioner leased the 3/8th share in the Chenderong Concession to the Cindee Developments Limited (the second ap-

pellant). The terms of this lease are not material to the issue in this case. For sometime nothing seemed to have happened. But on the 15th December, 1966, there was published in the Trengganu Government *Gazette* No. 125 (Notification No. 271) the Mufti's *fetua* which declares the *wakf* valid. This publication was expressed to have been made in the purported exercise of powers conferred by sub-section (3) of section 21 of the Enactment which is in these terms:

"(3) Any ruling shall, if the Majlis so determines or if His Highness the Sultan so directs, be published by notification in the *Gazette* and shall thereupon be binding on all Muslims resident in the State; Provided that a *fetua* on Malay custom shall be binding only on Muslims of the Malay race resident in the State."

On the 8th February, 1967, the plaintiffs commenced action seeking a declaration to invalidate the *wakf* and an order to set aside the lease granted to Cindee Developments Limited, the second appellant. The plaintiffs' amended statement of claim, particularly paragraph 7, is concerned mainly with the grounds for contending that the *wakf* is void according to Muslim law. But the defence pleadings, quite apart from contending otherwise also raised other questions all of which are founded on the facts already stated. In general terms, these other questions gave rise to the following heads of defence:

(a) that the plaintiffs not being Tengku Chik's beneficiaries have no right of action;

(b) even if they have any interests in the properties disposed of by the *wakf*, such interest have been extinguished by the deed of settlement 1957.

(c) that the plaintiffs are estopped from denying the validity of the *wakf*. The second appellant who raised this question relied on the deed of settlement 1957, the written agreement signed by Tengku Ngah in September, 1960 and the two letters of consent signed on 15th September, 1960.

(d) the publication of the Mufti's *fetua* in the Government *Gazette* under sub-section (3) of section 21 of the 1955 Enactment precludes the plaintiffs from bringing this action.

Taken together these heads of defence constitute a preliminary objection against the action by the respondents. The appellants, undoubtedly, were entitled to raise them as preliminary points for considerations. (a), (b) and (d) were considered by the learned trial judge but not (c). As regards (a) and (b), his Lordship concluded that the respondents have substantial interest in the subject matter of the *wakf* to support an action for declaratory reliefs. For this he relied on the authorities of *Guaranty Trust Company of New York* v. *Hannay & Company*[9] and *Barnard* v. *National Dock Labour Board*.[10] But as regards (d), the learned trial judge held to the effect that the publication of the Mufti's *fetua* in the Government *Gazette* could in no way affect the court's power to propound Muslim law. The words of the judgment are:

"I have given this matter considerable thought, and am of the view that even if it had been this court which had sought the *fetua*, the court yet retains unfettered discretion as to how much of such *fetua* it should accept, and may decline to be bound by it. I can find nothing in the Enactment which has affected the power of this court to propound Islamic law, which power I now propose to exercise."

On this point it is perhaps necessary to reproduce the defence contention raised in common by all the defendants:

"The *wakf* is valid and binding on the plaintiffs and each of them by reason of the fact that each of them is and was at all material times resident in the State of Trengganu and the validity of the *wakf* was affirmed by a *fetua* .... of the Mufti of Trengganu .... duly published pursuant to section 21 (3) of the Administration of Islamic Law Enactment, 1955 in the Government of Trengganu *Gazette* as Notification No. 271 of the 15th December 1966."

Upon reading the judgment of the trial court, it appears to me that this defence contention was considered on the assumption that the power or the jurisdiction of the court to propound (expound?) Muslim law was in question. Considered on that basis the learned trial judge, following the decisions in *Ramah binti Ta'at* v. *Laton binti Malim Sutan*[11] and *Patimah binti Hanis* v. *Haji Ismail bin Tamin*[12] held that the court is duty bound to propound local law. As regards section 21(3), which is also part of local law, the trial court considered it on the basis that the court is not bound by the Mufti's *fetua*. According to the judgment a curious anomaly has arisen in the States of West Malaysia from the fact that the courts' duty to propound the local law has proved in practice too inconvenient for those who had served their apprenticeships under a different system of laws. This, according to the trial judge, has led to the passing of enactments, particularly section 41(4) of the Selangor Enactment which provides an acceptable mode of obtaining expert opinion but which, however, is not binding on the court. Inasmuch as the defence contention in the present case involves only the consideration or construction of sub-section (3) of section 21 of the Trengganu Enactment I do not think much assistance can be derived by construing a provision of the Selangor Enactment which, at any rate is not *in pari materia* with the sub-section. Admittedly, the learned trial judge did consider section 4 of the Trengganu Enactment which expressly declares as unaffected the rights and powers of a civil court save as otherwise provided; section 25 which provides that the decision of the civil court is to prevail in the event of a conflict with a decision of the court of a Kathi. But these are general provisions undoubtedly designed to remove such doubt there may be as to the ordinary powers and jurisdiction of the civil court. The Trengganu Enactment, however, also contains specific provisions relating to the appointment of a Mufti for the State (section 5), the constitution of a Council of Religion and Malay Custom to aid and advise His Highness the Sultan in all matters relating to the religion of the State and Malay Custom (section 9). Section 20 specifically provides that any person, court, civil court, department or institution may apply for a *fetua* or ruling upon any question of Islamic law. Sub-section (6) thereof permits the publication of such *fetua* or ruling by the Commissioner of Religious Affairs, but is silent as regards the effect of such publication. But section 21(3) is yet another specific provision which is concerned not only with the publication of a *fetua* or ruling in the Government *Gazette*

but also with the effect of such publication. The words of the sub-section are so plain and unambiguous that it is not necessary to construe its meaning. It is implicit in the defence argument that the respondents, being bound to accept the validity of the *wakf*, must be precluded from litigating on it. Such a proposition is, of course, contrary to the well-known principle that the subjects are not to be excluded from coming to the court to have their rights determined. This principle was re-stated by Viscount Simonds L.C. in *Pyx Ganite Co. Ltd.* v. *Ministry of Housing and Local Government & Others.*[13] The Lord Chancellor said:

"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

But as I have pointed out section 21(3) of the Enactment contains clear words which seem to bar such recourse. In this case it was not open to dispute that the respondents are Muslim residents in the State. The sub-section is a legislative sanction against any further dispute on the validity of the *wakf*. The court cannot but take notice of it. To ignore it is to exceed its jurisdiction. In that context the appellants are justified in contending that the trial court has no jurisdiction to hear this case. The respondents have in their written submission suggested to the effect that the publication of the *wakf* was not in accordance with the sub-section. These suggestions do not have the force to carry the matter further. Accordingly, I would uphold the appellants' objection on this ground. This is sufficient to dispose off this appeal. I do not propose to consider the other heads of defence as set out earlier. In particular, I do not think it would be right for me to say anything on the validity of the *wakf*.

I would accordingly allow this appeal with costs here and below.

Appeal allowed.

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